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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FIDELIA ZOLEZZI,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO et al.,

Defendant and Respondent.

D039403

(Super. Ct. No. GIC 759351)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Hayes, Judge. Affirmed.

Fidelia Zolezzi appeals the court's grant of summary judgment in favor of the City of San Diego, San Diego Police Department, David Bejarano, and the City of San Diego Paramedics (collectively City). Zolezzi contends (1) she raised triable issues of fact as to whether police officers and paramedics violated 42 United States Code section 1983; (2) she has an equitable claim for the medical expenses resulting from police intervention; and (3) we should relieve her of the judgment because she failed to adequately respond to

the summary judgment motion due to surprise and ineffective assistance of counsel. We affirm.

### FACTUAL AND PROCEDURAL HISTORY

At 8:50 p.m. on February 16, 2000, San Diego police dispatcher Coral Villarino received a request from Adult Protective Services to check on the welfare of 85-year-old Zolezzi because someone had reported that her son and caretaker, Daniel Zolezzi (Daniel) might be abusing her. Villarino dispatched police officers to Zolezzi's home.

In response to the dispatch, San Diego police officers Gregory Mrvich and Kyle Kelley went to Zolezzi's home. Mrvich declared he and Kelley entered the residence after Daniel gave his consent. Daniel declared that when he told the police officers he was reluctant to let them in, they told him they had a right to come in and would come in. Because Daniel was afraid the police officers would break down the door if he refused to let them in, he consented under duress.

The police officers found Zolezzi clean and in bed sleeping. Kelley contacted paramedics to evaluate Zolezzi. Kelley also spoke with Dr. Gordon, the doctor who was treating Zolezzi. Dr. Gordon told Kelly Zolezzi should not be transported to a hospital.

At about 11:00 p.m., paramedics Lance Fickas and Collette Berwick arrived at the Zolezzi home. They examined Zolezzi, who was non-responsive. Zolezzi had a deformity of her left arm near her shoulder and there was a faint smell of urine about her. At Daniel's request, Fickas called Dr. Gordon, who told him that Daniel had refused the course of treatment he had suggested. Dr. Gordon expressed no opinion as to whether Zolezzi should be taken to the hospital. Fickas then spoke with a nurse at UCSD Medical

Center, the paramedics' base hospital, who urged him to transport Zolezzi to the nearest hospital.

Although Daniel initially objected to the paramedics' request to take Zolezzi to the hospital, he consented after speaking with the police officers. Fickas and Berwick took Zolezzi to Sharp Memorial Hospital and left her with emergency room personnel. No elder abuse was found.

Zolezzi was billed \$522.79 for paramedic services and \$2,065.15 for the hospital visit.

On April 23, 2001, Zolezzi filed a complaint asserting that her civil rights had been violated. Zolezzi and City agreed to a settlement conference scheduled for October 16, 2001, which the City took off calendar. On September 24, the City notified Zolezzi that it intended to file a dispositive motion. On November 14, City filed a motion for summary judgment. Zolezzi's response to that motion did not include a separate statement of disputed facts.

On December 14, 2001, the court granted City's motion for summary judgment because (1) Zolezzi failed to file a separate statement of disputed facts in opposition and (2) City's undisputed evidence showed City did not violate Zolezzi's constitutional rights. The court also denied Zolezzi's petition to amend the complaint because, in part, she failed to lodge a copy of the amended complaint and failed to file any supporting papers, including an affidavit of mistake, inadvertence, surprise or excusable neglect.

## DISCUSSION

### I. *Summary Judgment*

We reject Zolezzi's contention she raised a triable issue of fact that her civil rights were violated under title 42 United States Code section 1983 when police entered her residence without probable cause and when she was taken to the hospital over Daniel's objection.

Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).<sup>1</sup>) We review de novo the trial court's decision to grant summary judgment. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

The court properly refused to consider Zolezzi's opposition because Zolezzi failed to file a separate statement of disputed facts as required by section 437c, subdivision (b). As we recently explained, " '[A]ll material facts must be set forth in the separate statement. " . . . Both the court and the opposing party are entitled to have all the facts upon which the moving party bases its motion plainly set forth *in the separate statement*." [Citations.]' [Citations.]" (*Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1282; but see *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315.)

In order to grant summary judgment on City's moving papers, however, City must meet its "burden of production to make a prima facie showing of the nonexistence of any

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise specified.

genuine issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.) Further, "from commencement to conclusion the moving party bears the burden of persuasion that there is no genuine issue of material fact and that [it] is entitled to judgment as a matter of law." (*Ibid.*) City has met these burdens.

City met its burden that as a matter of law the police officers did not violate Zolezzi's Fourth Amendment or other civil rights by entering her home. City's summary judgment motion included declarations from officers Mvrich and Kelley that Daniel consented to their entry into the residence he shares with Zolezzi. Consent is a well-recognized exception to the warrant requirement. (*Schneckloth v. Bustamante* (1973) 412 U.S. 218, 219.) Further, another resident "with common or superior authority over the area to be searched" may give consent. (*People v. Woods* (1999) 21 Cal.4th 668, 675.) Thus, Daniel's consent was sufficient.

City also met its burden that as a matter of law Zolezzi's civil rights were not violated when the paramedics took her to the hospital. City's summary judgment motion included the declaration of paramedic Fickas, which stated that although Daniel initially objected when he was told paramedics planned to take Zolezzi to the hospital, Daniel consented after discussions with the police officers. Given that Daniel consented to the transport, no civil rights violation occurred.

## II. *Equity*

We reject Zolezzi's claim that she has an equitable action against City to pay for the medical expenses she incurred. "The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff's theories of liability *as alleged in*

*the complaint. . . .* "[A] motion for summary judgment must be directed to the issues raised by the pleadings. The [papers] filed in response to a defendant's motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings." [Citation.]' [Citations.]" (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343.) The only cause of action Zolezzi alleged in the complaint was a violation of her civil rights. Had she wanted to add other equitable causes of action, Zolezzi was required to move to file an amended complaint. We do not discuss the court's denial of Zolezzi's petition to amend the complaint because Zolezzi did not raise this issue on appeal and did not provide us with the relevant record.

### III. *Surprise, Excusable Neglect and Ineffective Counsel*

We reject Zolezzi's contention that we should relieve her from the court's grant of summary judgment under Code of Civil Procedure section 473, subdivision (b), because she was surprised by City's summary judgment motion and her counsel was ineffective.

Section 473, subdivision (b) provides in part: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. . . . No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate

any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . . "

(*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 681 (*Garcia*).)

We reject Zolezzi's contention she was surprised by City's summary judgment motion because she had expected to participate in a settlement conference. City informed Zolezzi on September 24 that it intended to file a "dispositive motion" that was filed on November 14. This gave Zolezzi more than enough time to begin discovery in preparation for trial or summary judgment.

Zolezzi also contends section 473, subdivision (b) is applicable because her attorney was ineffective. Although the courts are split, one court has held that relief is required under section 473, subdivision (b) when an attorney submits an affidavit of fault. (*Avila v. Chua* (1997) 57 Cal.App.4th 860, 868.) Because Zolezzi failed to file an affidavit of fault, this provision is not applicable.

Even had Zolezzi complied with that procedural requirement, the motion would not have been granted. "To determine whether the mistake was excusable, the court will inquire whether the same error might have been made by ' "a reasonably prudent person under the same or similar circumstances" . . . .' [Citation.] Conduct falling below the professional standard of care, such as failure to timely object or to properly advance an argument, is not therefore excusable. To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of

attorney malpractice." (*Garcia, supra*, 58 Cal.App.4th at p. 682.) Section 437c, subdivision (b) requires the party who opposes a summary judgment motion to include a separate statement of disputed facts and specifies what such a statement must contain. Zolezzi's failure to comply with this express statutory requirement falls below the standard of care and is not excusable under section 473, subdivision (b).

#### DISPOSITION

The judgment is affirmed. Each party is to bear its own costs on appeal.

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O'ROURKE, J.

WE CONCUR:

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NARES, Acting P. J.

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McCONNELL, J.